

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA L. CZYZYK,

Plaintiff-Appellant,

v

JOAN L. IRONS,

Defendant-Appellee.

UNPUBLISHED

March 10, 2005

No. 253126

Kent Circuit Court

LC No. 03-003007-CZ

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Plaintiff sued defendant for legal malpractice and breach of contract based upon defendant's representation of plaintiff in an earlier divorce action. Plaintiff appeals as of right the trial court's December 13, 2003 order granting summary disposition in favor of defendant. We affirm in part, reverse in part and remand.

I. Facts and Procedural History

Plaintiff retained defendant to represent her in a divorce action, the settlement of which was placed on the record and incorporated into a judgment of divorce entered on May 16, 2001. In February 2002, represented by different counsel, plaintiff moved for relief from the divorce judgment on the grounds of duress, arising in part out of her medical condition and medications she was taking at that time. After an evidentiary hearing, the trial court denied plaintiff's motion, concluding that there was nothing on the record indicating that plaintiff had been unable to participate in the proceedings, or indicating fraud or duress by the court or the opposing party to warrant setting aside the judgment. In reaching his conclusion, the trial court noted that if plaintiff had a "gripe" about the judgment, that "gripe" was with defendant and not with the court, and based on testimony at the evidentiary hearing, plaintiff seemed to have "a very legitimate gripe" with defendant. The trial court noted plaintiff may have believed she was getting a better settlement than she actually got because of representations by defendant, that the matter was settled over plaintiff's objection and request to defendant to have the proceedings adjourned, that plaintiff may have relied to her detriment on defendant's recommendation to enter into the settlement, and that plaintiff may have received poor advice from defendant regarding the settlement.

Thereafter, plaintiff initiated this action, asserting that defendant committed malpractice and breach of contract in connection with her representation of plaintiff in the divorce action.

Plaintiff alleged that defendant breached her duty to exercise the knowledge, skill, ability and care ordinarily possessed by attorneys in this state by failing to protect plaintiff's legal rights, failing to fully advise plaintiff of her legal rights, and failing to comply with the standard of practice and care and the ethical rules applicable to her representation of plaintiff. Plaintiff also alleged that defendant breached her contract with plaintiff by failing to obtain one-half of the marital property plus alimony in the divorce action.

Defendant moved for summary disposition, asserting that plaintiff was estopped from bringing her malpractice claims by the divorce trial court's denial of her motion for relief from the divorce judgment on the same grounds. Defendant also asserted that plaintiff's breach of contract claim was based on an alleged oral promise that is unenforceable as a matter of law, and that, to the extent that plaintiff's claims were predicated on violations of ethical rules that do not create a private cause of action for malpractice, they fail to state a claim upon which relief can be granted. The trial court granted defendant's motion for the reasons offered by defendant, and it is from this ruling that plaintiff now appeals.

II. Collateral Estoppel

Plaintiff first argues that the trial court erred in determining that she was collaterally estopped from bringing her malpractice claim because the issue of defendant's negligence or misconduct in representing plaintiff was not actually and necessarily litigated and decided in the prior matter. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court also reviews de novo the question of the applicability of collateral estoppel. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Generally, collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually litigated and necessarily determined in that prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001); *McMichael*, *supra* at 727. Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, ease fears of prolonged litigation, and encourage reliance on adjudication by preventing inconsistent decisions. *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 341; 657 NW2d 759 (2002). In applying collateral estoppel, courts must strike a balance between the rights of litigants to have their day in court and the need to eliminate repetitious litigation. *Howell v Vito's Trucking Co*, 386 Mich 37, 48; 191 NW2d 313 (1971).

Our Supreme Court has declined to abandon the requirement of mutuality of parties as a general rule in applying collateral estoppel. *Id.* However, in *Monat v State Farm Ins Co*, 469 Mich 679, 691-692; 677 NW2d 843 (2004), our Supreme Court held that "the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party already had a full and fair opportunity to litigate in a prior suit." Thus, collateral estoppel may be asserted by a defendant-attorney in a malpractice action, where the effectiveness or competency of the defendant's representation has already been determined in another proceeding. See, e.g., *Alterman v Provizer, Eisenberg, Lichtenstein & Pearlman, PC*, 195 Mich App 422; 491 NW2d 868 (1992); *Knoblach v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987).

In *Alterman, supra*, this Court affirmed the trial court's dismissal of the plaintiff's legal malpractice action on collateral estoppel grounds, where that action was founded on an allegation that the defendants negligently allowed the plaintiff to enter into a settlement when he was not mentally competent to do so and where the federal court in which the settlement was entered had previously determined, in the context of a motion to set aside that settlement, that the plaintiff had been mentally competent to enter into it. The Court in *Alterman* noted that to succeed in his malpractice action as pled, the plaintiff would have to establish that the defendants allowed or caused him to settle while he was not mentally competent to do so, and that this issue was identical to the issue previously decided by the federal court. *Id.* at 427. The Court also noted that there was no question that the plaintiff had had a full and fair opportunity to litigate the issue of his mental competency in the federal court action. *Id.* Therefore, the Court concluded that the plaintiff was collaterally estopped from relitigating the issue of his mental competence in the context of a malpractice action. *Id.*

The *Alterman* Court determined that the issue raised in the malpractice action had been fully litigated and finally adjudicated against the plaintiff in the underlying matter, such that success by the plaintiff on the malpractice claim clearly would have been inconsistent with the prior adjudication. Such is not the case here. In moving for relief from the divorce judgment, plaintiff asserted that she was heavily medicated at the time the settlement was entered into and asked defendant to adjourn the matter, but defendant did not do so; that the property settlement was so inequitable as to be unconscionable; and that plaintiff was subjected to intense pressure and duress to settle the matter. In denying plaintiff's motion, the trial court determined that there was no basis on the record to set aside the judgment. The trial court noted that plaintiff had indicated on the record that she understood and agreed to abide by the terms of the settlement, and that the court had to be able to rely upon such representations. The trial court further explained that there was no indication of fraud or duress by the court or the opposing party, and that, to the extent that there may have been duress on the part of defendant, that was an issue between plaintiff and defendant and did not affect the propriety of the judgment. The trial court specifically did not decide whether defendant provided competent representation; indeed the court stated that, given the information provided at the evidentiary hearing, plaintiff may have a "very legitimate gripe" with defendant, but expressly declined to decide whether plaintiff received competent representation from defendant, because it was not necessary to the decision to do so. Hence, plaintiff was not afforded a full and fair opportunity to litigate defendant's negligence or misconduct. Nor would success by plaintiff on her malpractice claim be inconsistent with the denial of her motion for relief from the divorce judgment. Indeed, given the trial court's many comments in this regard, such success by plaintiff would be entirely consistent with the prior ruling. Therefore, the trial court erred in granting summary disposition on the basis that plaintiff was collaterally estopped from pursuing her malpractice claim.¹

¹ Defendant also asserts that, in denying the motion for relief from judgment, the trial court determined that plaintiff understood the settlement. However, whether plaintiff understood the settlement is indeterminate of whether plaintiff settled the case under duress from defendant or in reliance on poor or incompetent advice, or whether she realized or was advised that the trial court would likely render a more favorable judgment. Thus, the ultimate question whether
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II. Breach of Contract

Plaintiff next argues that the trial court erred in determining that defendant's promise to obtain half of the marital estate plus spousal support was unenforceable. We disagree.

Plaintiff's breach of contract claim was founded upon alleged promises made by defendant after execution of the retainer agreement that she would obtain certain results for plaintiff in resolving the underlying case. The trial court determined that these promises were unenforceable contractual modifications under MCL 566.1,² because they were not in writing and plaintiff had not alleged or identified any consideration to support them. See *Minor-Dietiker v Mary Jane Stores, Inc*, 2 Mich App 585, 590; 141 NW2d 342 (1966) ("The intention of this statute [MCL 566.1] is not to make unenforceable all oral modification agreements, but only those in which no valid consideration is alleged."). In reviewing this decision, this Court must review the record in the light most favorable to the nonmoving party. *Dressel, supra* at 561. However, this Court may only consider what was properly presented to the trial court before the trial court rendered its decision on the motion. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

Plaintiff argues that her continued employment of defendant to represent her in the underlying action, where plaintiff had no duty to continue to employ defendant, constituted sufficient consideration for any modifications – including defendant's alleged promise to obtain half of the marital estate – to the retainer agreement. However, plaintiff did not make this argument before the trial court. Therefore, this issue was not properly preserved. *Gordin v William Beaumont Hosp*, 180 Mich App 488, 494; 447 NW2d 793 (1989). Further, even if properly preserved, plaintiff's assertion that her continued employment of defendant in the underlying matter constituted consideration for defendant's promises is misplaced. Consideration is the "cause, motive, price, or impelling influence which induces a contracting party to enter into a contract." *Sands Appliance Services v Wilson*, 463 Mich 231, 241-242; 615 NW2d 241 (2000) (citation omitted). Hence, plaintiff's continued retention of defendant to represent her in the divorce matter could only be consideration, if plaintiff's continued retention of defendant was the 'cause, motive or impelling influence' for the alleged promise. Plaintiff does not assert that such was the case and does not state that defendant's alleged promise was made after any expression of an intent to end the attorney-client relationship. Rather, plaintiff

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defendant committed malpractice was not decided, and indeed was expressly reserved, by the trial court.

² MCL 566.1 reads:

An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

asserts that merely because she could have ended defendant's representation, but did not do so, defendant's promises are binding. However, fulfilling a preexisting contractual duty is not consideration for a new promise. *Yerkovich v AAA*, 461 Mich 732, 741; 610 NW2d 542 (2000). Consequently, the trial court did not err in dismissing plaintiff's breach of contract claim.

III. Michigan Rules of Professional Conduct

Finally, plaintiff argues that the trial court erred in dismissing her claims because they adverted to ethical rules. We agree. While a violation of the Michigan Rules of Professional Conduct does not by itself give rise to a cause of action for damages incurred as the result of the noncompliance, it does constitute rebuttable evidence of malpractice. See *Beattie v Firmschild*, 152 Mich App 785, 791; 394 NW2d 107 (1986).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper